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In the Supreme Court
of the United States

OCTOBER TERM 1971

No._____

WILBUR-ELLIS COMPANY, a California corporation,

Plaintiff-Appellant-Petitioner,

v.

M/V CAPTAYANNIS "S," her engines, tackle, apparel and furniture; and her Owner, SARANTEX SHIPPING COMPANY a Panama corporation,

Defendant-Appellee-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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WILBUR-ELLIS COMPANY, a California corporation,

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M/V CAPTAYANNIS "S," her engines, tackle, apparel and furniture; and her Owner, SARANTEX SHIPPING COMPANY a Panama corporation,

Defendant-Appellee-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Wilbur-Ellis Company, a California corporation, prays for a writ of certiorari to issue out of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been officially or unofficially reported; the full text of the opinion appears in the Appendix (A).[1]

The United States District Court for the District of Oregon entered Findings of Fact, Conclusions of Law, a Memorandum Opinion and Judgment reported at 306 F. Supp. 866, 1969 A.M.C. 2484. These findings, conclusions and orders of the court appear in the Appendix (B).

JURISDICTION

The judgment sought to be reviewed is dated and entered of record on the 30th day of November, 1971.

The statutory provisions believed by the petitioner to confer jurisdiction upon this Court to review the judgment in question are 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).

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[1] References in this petition are as follows: (A) refers to Appendix hereto; (Tr.) refers to the transcript of testimony; (R) refers to the record certified and transmitted from the United States District Court for the District of Oregon to the United States Court of Appeals for the Ninth Circuit. The entire record, including transcript, court files with index thereto, and original exhibits, have been certified by the court below and filed in this court.

QUESTION PRESENTED FOR REVIEW

1. Does a finding of fact in admiralty that a vessel is unseaworthy and that its owners had not exercised due diligence coupled with a further finding of fact that the master was negligent in navigating the vessel which was the sole cause of the stranding legally require a conclusion that the vessel owner and/or operator is liable for cargo damage.

2. Is the shipowner liable for loss of cargo where unseaworthiness concurs with negligent navigation in causing the loss.

3. Is a shipowner bound by the master's admissions which are uncontradicted.

4. May the trial court choose to disbelieve unrebutted evidence concerning the occurrence of a stranding and decide a credibility issue where none was advanced.

5. Does the "clearly erroneous" doctrine under Rule 52 of the Federal Rules of Civil Procedure prohibit appellate review on factual issues where all crucial evidence is by deposition.

STATUTORY PROVISIONS

28 U.S.C. § 1254: Courts of appeals; certiorari; appeal; certified questions:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. * * *"

28 U.S.C. § 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

"* * * * *

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

STATEMENT OF THE CASE

A. Statement of Facts

Plaintiff-appellant-petitioner, Wilbur-Ellis Company (hereinafter referred to as "cargo" or "cargo owner"), filed an action in Admiralty for cargo damage and loss suffered as a consequence of the stranding of the Greek operated M/V CAPTAYANNIS "S" (hereinafter referred to as "ship" or "CAPTAYANNIS") at the mouth of the Columbia River on the early evening of October 22, 1967. Initially the Time and Voyage charterers were named as defendants, but the action was later dismissed as to them.

Cargo contended that the vessel was unseaworthy

at the inception of the voyage by reason of inadequate manning, inefficient radio station, and incompetent radio operator, and that the owner, possessed of this knowledge, failed to use due diligence to make the vessel seaworthy (R. 55-58). Cargo asserted that the stranding and loss were occasioned by the unseaworthiness of the vessel (R. 58).

The shipowner sought exoneration from liability under the Carriage of Goods by Sea Act, 46 U.S.C. § 1304 (Appendix C) and, alternatively, limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. § 183 (R. 58-59). Shipowner contended that the stranding occurred without its knowledge, privity, or fault, that it had exercised due diligence to make the vessel seaworthy at the commencement of the voyage, and that the cause of the casualty was the act, fault, or neglect of the Master in proceeding toward the mouth of the Columbia River without a bar pilot (R. 25-26).

The issue of liability of the vessel and the shipowner was segregated and tried to the court. The bulk of the evidence adduced was record and deposition evidence, although a small amount of live testimony was offered before the district court (Tr. 10-14, 21-51).

The district court found that the vessel was unseaworthy at the beginning of the voyage and that the shipowner failed to use due diligence in hiring the radio operator (R. 67). The district court disbelieved the Master's deposition testimony and found that the

ship was attempting to cross the bar without a pilot; the court held that the cause of the stranding was the navigational error and negligent decision of the Master (R. 70). The action was dismissed (R. 74).

Wilbur-Ellis appealed to the United States Court of Appeals for the Ninth Circuit and that court affirmed the judgment of the district court. Wilbur-Ellis Company, prays that a writ of certiorari issue out of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit.

B. Basis for Federal Jurisdiction

The district court's judisdiction was founded upon 28 U.S.C. § 1332, and jurisdiction of the United States Court of Appeals for the Ninth Circuit was premised upon 28 U.S.C. § 1291. Jurisdiction of this Court is based upon 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).

ARGUMENT

Reasons for Granting the Writ

(1) The Ninth Circuit decided an important maritime issue which petitioner asserts is in conflict with its own recent holding in *Waterman Steamship Corp.* v. *Gay Cotton*, 414 F.2d 724 (C.A. 9, 1969) (THE CHICKASAW) and in conflict with the spirit of and cases decided under the Carriage of Goods by Sea Act, 46 U.S.C. § 1304.

The voyage of the CAPTAYANNIS is a saga of a Master blinded by lack of radio and beset by an un-

manned vessel and incompetent crew. Impending disaster accompanied the Master, because his ship lacked effective radio communication—the radio operator was inexperienced and incompetent. It was not at all surprising that the vessel stranded on Clatsop Spit at the mouth of the Columbia River. The trial court found:

> "The short period of ownership of Vessel is a saga of difficulty with the radio equipment, principally the inability of the radio operator to communicate with land stations. Commencing on September 1st, while Vessel was at Rotterdam, until shortly prior to the grounding, the deck log is replete with entries evidencing abnormality in equipment and/or operation.
>
> "The Master's concern is evidenced in his correspondence to Owner. Originally he intended to accept the radio operator's report that the radio was damaged or defective. Later he questioned her competency. After reviewing and considering all of the evidence carefully I am in accord with this latter view and I find she was incompetent. * * * *"
>
> * * * * *
>
> "Furthermore, I do not believe Owner exercised due diligence in hiring her. The record is devoid of any indication as to the type of equipment she was familiar with or that she was ever informed of the make, type and age of the equipment on Vessel and whether she knew how to operate it or whether she had ever had experience in communicating with non-Greek stations or whether she knew and had used the International Morse Code or 'Q' signals for radio-telephone communication."

When the vessel arrived at the Columbia River entrance the weather was bad and the Columbia River Bar Pilots were not on station. The Master was unable to contact the shore because of lack of radio communication, and he steamed around for about 12 hours and, as he was still searching for a pilot vessel, he was carried in by the waves; the vessel stranded with subsequent damage to cargo. The trial court noted:

> "The Master states repeatedly that he continued on past the lightship and entered the channel for the purpose of locating the pilot or the pilot boat, all the while trying to raise the pilot by radio. The entries in the log book tend to support him, but there is no evidence as to when they were made. In any event I do not believe him.
>
> "* * *. Accordingly, I am of the opinion that the Master decided to cross the Columbia River Bar without a pilot—an exceedingly gross error in navigation and a decision of sheer lunacy."

All doubts as to the vessel's seaworthiness must be resolved against the shipowner. *SOUTHWARK*, 191 U.S. 1, 6, 24 S. Ct. 1 (1903). The evidence amply supports the District Court finding of unseaworthiness, and lack of due diligence.

Any unseaworthiness resulting from the shipowner's failure to exercise due diligence to make his vessel seaworthy, rendered the owner liable *even though the unseaworthiness concurred with negligent navigation of the Master in causing the loss.*

Unseaworthiness cannot be transformed into bad

seamanship for the purpose of avoiding responsibility for loss of the vessel's cargo. *THE TEMPLE BAR*, 45 F. Supp. 608, 617 (D.C. Md. 1942); *THE MARIA*, 91 F.2d 819, 824 (C.A. 4, 1937).

The Ninth Circuit cited *THE MARIA* with approval in *Waterman Steamship Corporation* v. *Gay Cottons*, (The CHICKASAW) supra, 414 F.2d 724, 737. There it was held that failure to have an efficient radio direction finder was sufficient for denial of limitation of liability when the defect combined with the crew's negligence (in using the defective instrument) to cause the stranding. In that case the Master was steaming at full speed (16.5 kts.) in bad weather and poor visibility and stranded on Santa Rosa Island off the California coast, 265 F. Supp. 595, 596, 597.

There are a great many decisions holding that negligent management or navigation coupled with unseaworthiness makes the carrier liable: see, e.g., *Union Carbide & Carbon Corp.* v. *United States*, 200 F.2d 908 (C.A. 2, 1953); *Spencer, Kellogg & Sons* v. *Great Lakes Transit Corp.*, 32 F. Supp. 520, 531 (E. D. Mich., 1940).

In *THE CHICKASAW*, the Ninth Circuit held that the vessel was liable to cargo and noted:

> "We hold that the court's finding that the stranding was not caused by the ship's failure to have an efficient radio direction finder, is, in the light of the Pennsylvania rule, clearly erroneous."

Wilbur-Ellis submits that the decision of the Ninth Circuit in this case is clearly inconsistent with its decision in the *CHICKASAW*.

(2) Where all or substantially all of the evidence is heard in open court before a judge with an opportunity to see the witnesses, hear their testimony, observe their demeanor, and participate in the trial process, the trial court is entitled to a rebuttable presumption of correctness. *THE PENNSYLVANIAN*, 139 F.2d 478, 481 (C.A. 9, 1943). However, that rule is less stringently applied where the probative evidence before the district court was merely deposition and record evidence, and where the fact finder had no opportunity to perceive the witnesses. *In such a case the appellate court will review the record fully and draw its own conclusion from the evidence. Matson Navigation Co.* v. *Pope & Talbot, Inc.*, 149 F.2d 295, 298 (C.A. 9, 1945). The same rule is followed in the Fifth, Fourth, and Second Circuits. *Waterman S.S. Corporation* v. *United States S. R. & M. Co.*, 155 F.2d 687 (C.A. 5, 1946); *THE AMBRIDGE*, 42 F.2d 971 (C.A. 4, 1930); *THE KALFARLI*, 277 F. 391 (C.A. 2, 1921).

(3) The district court found a credibility issue where none existed. *There was no evidence that the Master sought to enter the channel sans pilot.*

The only evidence was adduced from the ship's witnesses: Master, Mate, and Lookout. All testified that the vessel approached the lightship seeking the pilot. After hours of fruitless signaling and ineffective communication, the Master brought the vessel closer, still seeking the pilot, not venturing across the bar on his own. The wind and wave put the vessel in irons. The stranding followed.

Wilbur-Ellis submits that the vessel owner is bound by the Master's admission (confirmed by the Mate and Lookout) that he entered the approaches to the river solely to find a pilot and the pilot vessel. If his radio operator had not been incompetent he would have known that the pilots were not working.

Mr. Justice Davis in *THE POTOMAC*, 75 U.S. (8 Wall.) 590, 594 (1869) noted:

> ". . . His (the Master's) statements on the point were full and explicit, and could not have been easily misunderstood; but if they were not true, or were misunderstood, why was he not called to contradict or explain them? The legality of this evidence cannot be questioned, for courts of admiralty have uniformly allowed the declarations of the Master, in a case of collision, to be brought against the owner on the ground that when the transaction occurred, the Master represented the owner, and was his agent in navigating the vessel. . . ."

Let it be assumed that there was sufficient evidence or inferences from which the conclusion could have been drawn that the Master *deliberately attempted* to cross the bar without a pilot. Cargo submits that the reason for such foolhardy acts and grossly negligent navigation was the unseaworthiness of the vessel (it was without radio communication) within the privity and knowledge of the owners. The owners, by making the Master command an unseaworthy vessel had, in fact, placed him in a position so that he could do nothing else but commit a negligent act of navigation. Cargo submits that under

COGSA, 46 U.S.C. § 1304, and these facts that the unseaworthiness found by the district court entitles it to prevail.

The evidence in the case clearly indicated unseaworthiness within the privity and knowledge of owners and that the owners had not exercised due diligence. The trial court, however, found that the stranding was as a sole result of negligent navigation on the part of the Master but there was absolutely no evidence to show that that negligent navigation was a volitional act by the Master.

If it was negligent navigation, then the Master had been placed in a position by the owners to commit such an act of negligent navigation. There was uncontradicted testimony from the Master and crewmembers as to why the vessel was carried in over the bar and this was disbelieved by the trial court. Cargo believes that the decision of the Ninth Circuit is in conflict with the *CHICKASAW* holding and other cases, and for these reasons petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILBUR-ELLIS COMPANY, a California corporation, *Plaintiff-Appellant*, v. THE M/V CAPTAYANNIS "S," her engines, tackle, apparel and furniture; and SARANTEX SHIPPING COMPANY, her Owner, a Panama Corporation; and A. H. BASSE A/S of COPENHAGEN, the Time Charterer; and NORSILDMEL of BERGEN, the Charterer, *Defendants-Appellees.*	No. 25,332

[November 30, 1971]

Appeal from the United States District Court
for the District of Oregon

Before: WRIGHT and CHOY, Circuit Judges, and POWELL, District Judge*

PER CURIAM:

This admiralty action is to recover the value of cargo lost by reason of the stranding of the Greek ship M/V Captayannis at the mouth of the Columbia River. The facts are stated in the district court's

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* The Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, sitting by designation.

opinion appearing in 306 F. Supp. 866 (D.C. Ore. 1969). The district court found that the ship was in many respects improperly equipped and incompetently manned, rendering it unseaworthy at the beginning of the voyage.[1] Despite this finding the court entered judgment for the defendant shipowner, finding that the sole and proximate cause of the ship's stranding was the master's negligent decision to proceed across the Columbia River bar in a storm without a pilot. Where the loss is due to navigational error the shipowner is exonerated from liability.[2]

Appellant advances several arguments in asking reversal of the decision of the district court. Appellant relies on *Matson Navigation Co.* v. *Pope & Talbot*, 149 F.2d 295 (9 Cir. 1945) as defining the extent of the appellate review allowed to this court on such an appeal as this:

> "The rule in admiralty cases is that, although an appeal opens the case for a trial de novo, findings of fact are entitled to great weight but such rule is modified where the findings are based wholly upon depositions." (149 F.2d 295, at 298).

While it is true that this case was submitted almost entirely on depositions and exhibits a review of

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[1] 46 U.S.C. § 1303(1)(a)(b), Carriage of Goods by Sea Act.

[2] 46 U.S.C. § 1304(2)(a), Carriage of Goods by Sea Act:
"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;"

the record persuades this court that the decision below is not clearly erroneous.

Appellant further contends that where no contrary evidence exists the shipowner is conclusively bound by the master's admissions; in this case that he neared the Columbia River bar solely to look for the pilot vessel. The contention appears to be contrary to the rule. Judicial admissions of the master are only evidentiary and may be discredited or disbelieved by the trier of fact. See: *Cox* v. *Esso Shipping Company*, 247 F.2d 629 (5 Cir. 1957); *The Monarch of Nassau*, 155 F.2d 48 (5 Cir. 1946); *The W. Talbot Dodge*, 15 F.2d 459, 460 (S.D. N.Y. 1926).

A rule making such admissions conclusive would appear to invite collusion and would also place an undue premium on self-serving testimony.

In support of its argument plaintiff contends that the district court erred in disbelieving the uncontroverted testimony of the master as to why he proceeded into the mouth of the Columbia River. *Quock Ting* v. *United States*, 140 U.S. 417, 420-21 (1891), held that the court is not bound to accept uncontroverted testimony at face value if it is improbable, unreasonable or otherwise questionable.

For the above reasons, and those appearing in the opinion of the Honorable William T. Beeks in 306 F. Supp. 866 (D.C. Ore. 1969), judgment for the defendant is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILBUR-ELLIS COMPANY, a California corporation, *Plaintiff*, v. THE M/V CAPTAYANNIS "S," her engines, tackle, apparel and furniture; and her Owner, SARANTEX SHIPPING COMPANY, a PANAMA CORPORATION; and A. H. BASSE A/S of COPENHAGEN, the TIME CHARTERER; and NORSILDMEL OF BERGEN, the CHARTERER, *Defendants.*	CIVIL No. 67-568 OPINION

Plaintiff, consignee of a cargo of fish meal, seeks to establish liability of the Greek cargo motor vessel CAPTAYANNIS "S" (Vessel) and Sarantex Shipping Company, a Panamanian corporation (Owner), for cargo damage/loss and other expenses arising out of the grounding and constructive total loss of Vessel on Clatsop Spit at the mouth of the Columbia River.[1]

Defendants A. H. Basse A/S of Copenhagen and Norsildmel of Bergen, time and voyage charterers, respectively, of Vessel, have been dismissed from this action.

[1] The grounding occurred approximately .6 miles from Buoy No. 10 on a bearing of approximately 140° T at 1036 on October 22, 1967.

To establish liability plaintiff contends Vessel was unseaworthy in that (1) the radio transmitters and receivers were defective, (2) the radio operator was incompetent, (3) the vessel was manned by an incompetent and inexperienced crew, and (4) did not have a sufficient complement of officers to stand watch so that the Master was caused to suffer great fatigue and anxiety, all of which were known to Owner who failed to use due diligence to make Vessel seaworthy before and at the beginning of the voyage, as required by Sec. 3, U. S. Carriage of Goods by Sea Act,[2] and all of which proximately resulted in the casualty aforesaid.

Defendant denies plaintiff's contentions and states affirmatively (1) it exercised due diligence to make Vessel seaworthy at and before the commencement of the voyage, and (2) the grounding proximately resulted from the act, neglect or fault of the Master for which it is exempted from liability by Sec. 4, U. S. Carrier of Goods by Sea Act,[3] but (3) if liability be established it is entitled to information thereof pursuant to 46 U.S.C.A. 183 *et seq.*

Owner acquired Vessel in Rotterdam during the latter part of August, 1967, and on September 2nd she departed for Aalesund/Molustranda, Norway for the loading of cargo. On September 13 Vessel departed her last loading port for Portland, Oregon. She transited the Panama Canal on October 7th and arrived off

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[2] 46 U.S.C. § 1303(1)(a) and (b).

[3] 46 U.S.C. § 1304(2)(a).

the Columbia River lightship in the early morning of October 22nd, the day of the casualty.

The short period of ownership of Vessel is a saga of difficulty with the radio equipment, principally the inability of the radio operator to communicate with land stations. Commencing on September 1st, while Vessel was at Rotterdam, until shortly prior to the grounding the deck log is replete with entries evidencing abnormality in equipment and/or operation.

The Master's concern is evidenced in his correspondence to owner.[4] Originally he tended to accept the radio operator's report that the radio was damaged or defective. Later he questioned her competency: After reviewing and considering all of the evidence carefully I am in accord with this latter view and I find she was incompetent. The radio operator was a young lady 25 years of age of Greek nationality. Following graduation from high school she attended a two year school where she received training in radio operation, followed by three years service (1963-1966) on two Greek Mediterranean cruise ships which did not operate during the 3-4 winter months. She received her radio operator's license in October 1966. For the last three months of her employment on one of the cruise ships she served as radio operator.

I find it singular that throughout the voyage she had little difficulty in communicating with other Greek vessels, but for the most part she was unable to communicate with non-Greek land stations.

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[4] See Appendix A for correspondence.

Furthermore, I do not believe Owner exercised due diligence in hiring her. The record is devoid of any indication as to the type of equipment she was familiar with or that she was ever informed of the make and type and age of the equipment on Vessel and whether she knew how to operate it or whether she had ever had experience in communicating with non-Greek stations or whether she knew and had used the International Morse Code or "Q" signals for radio-telephone communication. The brief and sketchy investigation made by Owner of her qualifications prior to employment was inadequate to determine her competency on a ship such as Vessel for a voyage such as that in contemplation.

At about 2400, October 21st, the radio operator informed the Master that she could not send telegrams to Vessel's agent in Portland relating to arrival and other matters and at that time the Master logged that he had "received cable from the Pilot station Astoria that the Pilot will try to board on arrival provided weather conditions allow it" although he had not received weather reports as to the conditions of the Columbia River entrance.

At 0430, October 22nd, Vessel sighted the Columbia River lightship and the Master states he attempted to communicate by some type of Morse blinker without answer.

At 0500, the Master noted in the deck log "presume pilot will be unable to embark. . . ."

At 0512 the Master said he again attempted to

communicate with the lightship by whistle signal but received no response.

During the forenoon the Master states he was informed by the radio operator that she was attempting to contact the Pilot station in Astoria without result and at 1000 he entered in the log "The Radio Operator does not try to contact Astoria Radio Station for assistance by the Pilots, but she is in communication with other Greek vessels in the area for matters unconnected with ship's service."

From 0500 to 1535 the deck log records the wind as between Force 8-9[5] with high seas, which between 0800 and 1200 were breaking over the decks. Force 8 is a fresh gale with winds of 34-40 knots. Force 9 is a strong gale with winds of 41-47 knots. At Force 8 waves are as high as 58′ but average 19′-28′. At Force 9 they are as high as 81′ but average 31′-40′.[6]

At 1535 the Master testified it rained very heavily and the waves seemed to subside to 10′-15′ which made it possible to change course to a 40°T. for the purpose, so he says, of coming up on the lightship to attempt to communicate a further request for a pilot. He continued this course until 1730 at which time he was 2.5 miles from the lightship on a bearing of approximately 152°T. At this time he changed course to 045T, the main channel course to Sand Island Range. Thereafter, the deck log records buoys 2 to 8 (main channel markers) all of which were encountered on

[5] Beaufort's Scale.
[6] Hydrographic Office Pub. 603, 1955.

the main channel course of 045T. At 1822, abeam Buoy #8, the log records a course change to 080°, the proper course for the Sand Island Range, and a notation that "From Columbie L/V we encountering exceptionally high seas, after decks and boat decks covered by high seas. Requesting Pilot using ship's blast. Unable keep vessel in center of channel and we drifting continuously towards the starboard end of the channel and vessel is almost out of control."

As should have been expected the wave height increased as the water depth decreased, Vessel was in heavy breakers and out of control and she was fast aground at 1836.

The Master states repeatedly that he continued on past the lightship and entered the channel for the purpose of locating the pilot or the pilot boat, all the while trying to raise the pilot by radio. The entries in the log book tend to support him, but there is no evidence as to when they were made. In any event I do not believe him.

The Master knew that a pilot would be available only if the weather allowed it and he recorded in his log that weather conditions were such that he presumed the pilot would be unable to embark. The radio operator testified she received a telegram from the pilot during the forenoon of October 22nd stating the weather was bad and he could not come. I am satisfied that the Master knew that a pilot would not be available under the existing conditions of wind and sea. Accordingly, I am of the opinion that the Master

decided to cross the Columbia River Bar without a pilot—an exceedingly gross error in navigation and a decision of sheer lunacy.

The immediate cause of the grounding was the Master's decision to proceed across the Columbia River Bar, but was it the proximate cause? If so, this action must be dismissed. As previously indicated, I do not believe the Master proceeded down the main channel beyond the lightship to locate the pilot, nor do I believe the inability of the radio operator to communicate with the pilot/pilot station on October 22nd proximately caused his ill advised course of action.

Thus, the only area left for exploration is whether the incompetence of the radio operator or the manner in which Vessel was manned and watches determined, both of which were known to Owner before and at the beginning of the voyage, played any part in the Master's decision. In short, may it be said that the decision was that of a mind fatigued by worry and overwork? Was he capable of making a decision or did the factors mentioned in the following paragraphs, singly or together, render him incompetent to properly judge? If so, his decision would not be the proximate cause of the casualty.

The manning of Vessel was reminiscent of the days of the Brig PILGRIM and the Bark CUTTY SARK when profits were the owners' paramount consideration and human values were of little significance. Vessel's complement consisted of the Master and twenty crewmen, the deck officers consisting only

of a Chief Second Mate. The deck crew were divided into two watches, the superannuated "watch and watch" system in which the officers and crew stood watch twelve hours a day in two watches of six hours each, a method which in itself is an invitation to disaster.[7] The Chief Mate and two seamen had the 6-12 watch and the Second Mate and two seamen the 12-6 watch. The Master agreed to stand a watch[8] and because the Second Mate was inexperienced the Master stood his watch for him.[9]

By American standards Vessel was undermanned, but there is no statutory violation involved as in *Denali*,[10] and, except as hereinafter stated, the undermanning establishes only the parsimony of Owner.

From the evidence it would appear that the incompetence of the radio operator and inability to receive weather reports caused the Master to be extremely weary and exhausted, particularly while traversing the Caribbean, as is evidenced by the aforementioned letters from the Master to Owner.[11]

More than 50 years ago Judge Hough recognized

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[7] This system is unlawful under American law. *The Denali*, 105 F.2d 413 (9th Cir. 1939), aff'd re-hearing, 112 F.2d 952 (1940) cert. denied, 311 U.S. 687, 85 L. Ed. 444 (1940) and 46 U.S.C. 673 (enacted subsequent to the occurrence which resulted in *The Denali* litigation).

[8] Ex. 49, page 11.

[9] Ex. 9, a letter from the Master to the Owner, wherein it is said "Michaletos (Second Mate) lacks bridge experience, but I will take his place there."

[10] See note 7, *supra*.

[11] See Appendix A.

the same problem in *Union-Dalzelline*, 1932 A.M.C. 1331, 1336 (1914) when he said:

> "It is matter of common knowledge that safety in anything which requires human effort depends, in the last analysis, on the human being. A weary man is infinitely more dangerous than a defective pipe or an obscured light, because he is unfit to discover the fitness of the inanimate object."[12]

There is other evidence, however, which must be considered in determining the reason for the Master's ill-fated decision of October 22.

As Vessel approached the Azores the Master notified Owner that the radio was in bad condition and that he should approach a port and repair it. Owner refused permission because each delay was very important because it was against the charter party which I interpret to mean that delay would subject Owner to a claim for damages.[13] On October 4th the voyage had been delayed two days and the Master was concerned because he could not "gain better speed than 12-12.5 K during good weather.[14] On October 14th he wrote Owner that he expected to reach Portland by October 21st.

Thus, on the morning of October 22nd we have a vessel off the Columbia River Bar considerably de-

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[12] Quoted with approval in *The Denali*, Note 7, *supra*.

[13] Owner's time charter provided that the Master shall prosecute his voyage with the utmost dispatch.

[14] In the time charter Owner warranted 13 knots in good weather.

layed on her voyage from Norway because of weather and inability to conform to her warranty of speed, commanded by a young man, his first command, anxious to make a name for himself and desirous of reaching Portland that day, a day later than he had forecast one week previously, and fearful of incurring the wrath of a penurious owner.

I suspect that the long hours of work, the fatigue and anxiety may have affected the Master's judgment, but I am unable to find this as a fact from the evidence before me. The letter of 10/14/67[15] does not mention exhaustion, and there is nothing in the evidence subsequent to 10/6/67 so indicating. Accordingly, I find the proximate cause of the casualty to be the Master's negligent decision to proceed across the Columbia River Bar.

If the carriage here involved was subject to the Harter Act[16] I would deny defendant exoneration and enter judgment for plaintiff.[17]

Likewise, if a statutory violation was involved in the manning of Vessel or in the watch system employed by Owner, I would enter judgment for plaintiff because there are

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[15] See Appendix A.

[16] 46 U.S.C. § 192.

[17] Exoneration from liability for faults or errors in navigation under Section 3 of the Harter Act, is conditioned upon the use of due diligence to make the vessel in all respects seaworthy and properly manned whether or not there is any causal relation between the unseaworthiness and the loss. *The Isis*, 290 U.S. 333; 78 L. Ed. 348; 1933 A.M.C. 1565.

". . . compelling reasons why the violation of a statute to prevent loss of life and property by attempting to secure absence of fatigue from the vessel's navigators shall have the Pennsylvania rule apply in suits against the owner. . . ."[18]

and once the violation is found it is presumed that the fault is causal and the violator has the burden of showing it was not.[19] This burden is extremely difficult, if not impossible, for the violator to discharge[20] and if Owner had such burden here I would find that he had not discharged it.

The right of shipowner to exoneration from liability under Section 4(2)(a) of the Carriage of Goods by Sea Act[21] is, unlike the Harter Act, not conditioned on a showing that due diligence was used in making the vessel seaworthy and properly manned before and at the beginning of the voyage.

Therefore, the action is dismissed with costs in favor of defendant. A conforming judgment reflecting my findings and conclusions, shall be drafted, served and presented by counsel for defendant.

Dated this 10th day of November, 1969.

WM. T. BEEKS
United States District Judge

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[18] *The Denali*, 112 F.2d 952, 957 (1940).
[19] See Note 18, *supra* at 959.
[20] See Note 18, *supra* at 957.
[21] 46 U.S.C. § 1304(2)(a).

APPENDIX A

10/4/67 (two days prior to arrival in Cristobal)

"Up until the Azores we had stormy seas, 5-6 foot waves, except for a tropical storm north of the Azores which moved eastward and which, fortunately, I skirted for a few hours. I came into a big storm with mountainous waves, 50-60 feet high, and winds of velocity 10 (_____). We proceeded finally, but we were delayed two days. We were fortunate to escape calamity, and I owe this to my knowledge of this area, because as you know, we had no wireless and could not receive weather reports. I shall write to you about this later.

"Our Voyage continued with the usual weather of this season, until 27/9, when a passing ship informed us that we were heading into a cyclone. We still had no wireless, and could not receive bulletins. We finally were able to hear that in front of us was cyclone Edith, and next to us was a tropical storm which would become a cyclone. Fear and anxiety were my companions, but I was able to complete the whole trip with God's help."

* * * * *

"Unfortunately, the ship lacks a wireless, and this is true. Almost throughout our voyage, we tried to find a passing ship so we could send the necessary telegrams and reports about the weather, and that was not always possible. It is dangerous for a ship to be without a wireless. It's like the blind man who knows not where to go. At Alesund we made repairs, but a few hours after sailing we were without wireless again. We tried to repair it, and succeeded partially, working on

the inner tubes, but with small results. The wireless operator does not have the required knowledge, and you can understand what can happen on a ship where there is no communication. When we arrive in Panama I will call experts.

"From the above events you must realize my exhaustion and my anguish. I am in the chart room on the bridge, and I seldom leave here to go down to my room. I must follow and direct everything continually, all the movements of the ship. I glorify God to this day because things are better than I have anticipated, and I don't complain about being tired."

10/6/67 (at Cristobal)

"My biggest problem that made me weary was the matter of the wireless operator. You must bear in mind that sailing away from Alesund we were without wireless on the ship. I was left without communication, without weather reports and without any contact. The wireless operator maintained that the wireless was cheap of quality but I think the opposite. The whole voyage I spend on the bridge in the chart room so I can follow her and to urge her to keep trying. The only ones she was able to communicate with were the Greek ships. Thus we were able to send those indispensable telegrams. Sailing at this very dangerous time of the year, and in this territory where there are typhoons and without weather reports and only experience to depend on. * * *

"She makes me so nervous that one of these days I will throw her overboard."

10/14/67 (at sea, enroute to Portland, Ore.)

"It has been a week since we left the Panama Canal and already we are in the Gulf of California sailing at full speed toward Portland, which, with God's help, we hope to reach October 21, thus ending this long trip from Norway. Since the weather was good today, I took the opportunity to leave the bridge and write to you a few words. * * *"

"The wireless is a big problem, and the wireless operator has created many problems for me. The only thing the wireless operator does is to call Greek ships and send telegrams, and while she cannot communicate with near-by stations, she is able to communicate with ships twice the distance away." * * *

"To continue about the wireless operator, I understand she lies to me in order to cover her inexperience, in spite of the fact that I have always been good to her, and this is one reason that to this day I don't understand what is going on in the wireless. These days we pass many ships, the *Plothy* and the *Laimau*. We have continuous communication and they all hear us very well on the telephone, in briefs and in between. But when the time comes for a bulletin or when I tell her to listen for a telegram, she answers that the wireless is out of order. Of course I'm not surprised, because she is a woman and does have a weapon in her lies. I repeat, this has been a voyage without bulletins in a dangerous territory, in a small ship without communications, weather reports, and without directions. Let us hope that all will go well and we will not blunder and have other problems."

Wood, Wood, Tatum, Mosser & Brooke
15th Floor Standard Plaza
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224-5430
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILBUR-ELLIS COMPANY, a California corporation, *Plaintiff,* v. THE M/V CAPTAYANNIS "S," her engines, tackle, apparel and furniture; and her Owner, SARANTEX SHIPPING COMPANY, a Panama Corporation; and A. H. BASSE A/S of Copenhagen, the Time Charterer; and NORSILDMEL of Bergen, the Charterer, *Defendants.*	CIVIL No. 67-568 JUDGMENT

This case came on for trial before the undersigned Judge on October 9, 1969, plaintiff being represented by Kenneth E. Roberts, of its counsel, and defendant being represented by John R. Brooke, of its counsel. Evidence on behalf of both parties was received and both parties rested. The Court having heard and considered the testimony, and having considered the evidence and exhibits, and having considered the written briefs of counsel, and the Court having made and filed its opinion which shall stand as its Findings of

Fact and Conclusions of Law, and based upon these Findings of Fact and Conclusions of Law.

IT IS ORDERED that this case is dismissed with prejudice and the defendant recover its costs against plaintiff, Wilbur-Ellis Company, taxed in the sum of $768.54.

DATED this 20th day of November, 1969.

WM. T. BEEKS
United States District Court

Presented by:
John R. Brooke
JOHN R. BROOKE
Of Counsel for Defendant
Sarantex Shipping Company

APPENDIX C

CARRIAGE OF GOODS BY SEA
46 U.S.C. § 1304

Rights and immunities of carrier and ship—
Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual

fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agent, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in

packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, explosive or dangerous cargo

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment, where of the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.

Supreme Court, U.S.
FILED
JAN 17 1972
E. ROBERT SEAVER, CLERK

In the Supreme Court

of the United States

OCTOBER TERM 1971

No. 71-887

WILBUR-ELLIS COMPANY, a California corporation,

Plaintiff-Appellant-Petitioner,

v.

M/V CAPTAYANNIS "S," her engines, tackle, apparel and furniture; and her Owner, SARANTEX SHIPPING COMPANY a Panama corporation,

Defendant-Appellee-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-72

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS WHY PETITION SHOULD NOT BE GRANTED

No Constitutional or Legal Question Is Involved

The District Court found the proximate cause of the grounding of the CAPTAYANNIS S was an error of navigation by the master (Op. Dist. Ct. Appx. B, Pet. for Cert., p. 25). The Court of Appeals for the Ninth Circuit, after reviewing the record, held the District Court's finding was not clearly errone-

ous and affirmed.[1] (Op. Ct. Appeals, Appx. A, Pet. for Cert., p. 15). Petitioner now asks this Court to review the evidence again.

Petitioner completely misstates the question presented for review in saying:

> "2. Is the shipowner liable for loss of cargo where unseaworthiness concurs with negligent navigation in causing the loss."

The unseaworthiness was *not* a concurring cause. As said in the Court of Appeals per curiam opinion:

> ". . . the court entered judgment for the defendant shipowner, finding that the sole and proximate cause of the ship's stranding was the master's negligent decision to proceed across the Columbia River bar in a storm without a pilot." (Appx. A, Pet. for Cert., p. 14).

The Carriage of Goods by Sea Act, 46 U.S.C. § 1304(2)(a), grants to a shipowner exoneration from liability for a loss resulting from an error of navigation. The District Court simply applied that statutory rule of law to its finding of fact and dismissed the cargo owner's damage action. The Court of Appeals affirmed. There is no special or important constitutional or legal question involved here so as to satisfy the criteria for certiorari set forth generally in Supreme Court Rule 19. The petition merely seeks a review of the evidence and inferences to be drawn from the evidence. This Court pointed out in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304

[1] Federal Rules of Civil Procedure Rule 52(a).

U.S. 175, 58 S. Ct. 849, 82 L. Ed. 1273 (1938), that writs of certiorari will not be granted for that purpose.

The District Court's Finding Was Supported by Evidence

Contrary to petitioner's assertions, there was substantial evidence in the record to show a navigational error by the master. The District Court noted some of that evidence in its opinion:

> "The Master knew that a pilot would be available only if the weather allowed it and he recorded in his log that weather conditions were such that he presumed the pilot would be unable to embark. The radio operator testified she received a telegram from the pilot during the forenoon of October 22nd stating the weather was bad and he could not come. I am satisfied that the Master knew that a pilot would not be available under the existing conditions of wind and sea. Accordingly, I am of the opinion that the Master decided to cross the Columbia River Bar without a pilot—an exceedingly gross error in navigation and a decision of sheer lunacy." (Op. Dist. Ct. Appx. B, Pet. for Cert., pp. 21-22).

Expert witness Captain Harold Dumble testified the master should never have committed his vessel to the shallow water of the Columbia River Bar where the seas would double in size and where a pilot could not possibly board (Tr. p. 43).

CONCLUSION

There is no reason for a review of the evidence by this Court. It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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